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SERIOUS AND WILFUL MISCONDUCT - WHAT WERE THEY THINKING!

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SERIOUS AND WILFUL MISCONDUCT UNDER THE ACCIDENT COMPENSATION LEGISLATION

Section 82(4) of the *Accident Compensation Act 1985* (**the ACA**) (applying to injuries sustained prior to 1 July 2014) and section 40(5) of the *Workplace Injury Rehabilitation and Compensation Act* (**the WIRCA**) (applying to injuries sustained on 1 July 2014 onwards) are largely identical and state:

"...if it is proved that an injury to a worker is attributable to the worker's serious and wilful misconduct (including, but not limited to, being under the influence of intoxicating liquor or a drug or both), there is no entitlement to compensation in respect of that injury".

The burden of proving serious and wilful misconduct rests with the employer.

WHAT AMOUNTS TO SERIOUS AND WILFUL MISCONDUCT?

There is no general principle or rule which determines whether particular behaviour is serious and wilful misconduct with each case depending upon its own particular facts. However, there is an extensive line of case law providing guidance on each aspect of the defence as follows.

Serious

The word "serious" relates to the nature of the misconduct rather than the actual consequences of the misconduct. To be "serious" the misconduct must have a real tendency to increase the risk of injury occurring and the worker must have an appreciation of that risk.

Case note – *Comcare v Calipari* [2001] FCA 1534

Mr Calipari while at work made offensive and distasteful remarks to a co-worker that went beyond office banter and were clearly made with the intention of provoking a response from the co-worker. The Court had little difficulty in characterising Mr Calipari's behaviour as "misconduct" and "wilful". The reaction Mr Calipari's remarks caused were extreme – with the co-worker leaping across two desks and a dividing partition onto Mr Calipari's desk and assaulting him causing Mr Calipari injury.

In issue was whether Mr Calipari's conduct was "serious" and the Court posed the two questions to be answered being firstly whether Mr Calipari's conduct gave rise to an immediate risk of non-trivial injury, and secondly, did Mr Calipari have an appreciation of this risk?

The Court ultimately found that because Mr Calipari knew his co-worker was easily provoked, there was a history of tension between them and the co-worker was also an expert in martial arts Mr Calipari appreciated he may be seriously injured as a result of his actions.

Wilful

The word “wilful” means the worker must have acted deliberately and must have had knowledge of the risk of injury and, in the light of that knowledge, proceed without regard to that risk.

Negligence does not equate to serious and wilful misconduct without more. This is particularly apparent in cases involving driving which emphasise that negligence and a breach of traffic regulations will not alone amount to serious and wilful misconduct.

However, there are cases that suggest a reckless indifference or gross misconduct can satisfy the “wilful” element of the defence. For the defence to be successfully raised in those circumstances, the case law suggests that it must be demonstrated that the person performing the act or omission knows it will give rise to the risk of injury and in light of that knowledge acts in disregard to whether that injury will occur.

Case note – *Mr ABC v DEF Buslines*

Mr ABC was a bus driver who ran a red light whilst driving a bus in the course of his employment causing a motor vehicle accident that resulted in him sustaining both physical and psychiatric injury.

Witnesses driving behind Mr ABC noted the light had been red for some 5 seconds before the bus reached the intersection but the bus continued through as if the light was green, not slowing down or braking. Witnesses on the bus stated they had shouted at Mr ABC that the light was red and but he did not respond taking no evasive action to avoid the accident. After the accident, Mr ABC had advised the passengers the brakes had failed. Experts examined the bus following the incident and did not note any defects. Mr ABC was subsequently convicted of criminal offences arising from the incident.

The key issue in the case was whether “wilfulness” could be established with Mr ABC representatives contending there was no evidence that Mr ABC deliberately ran the red light. We contended that whether Mr ABC deliberately ran the red light did not matter because the evidence established he drove in a reckless manner with no regard to the consequences of whether his actions caused injury. Ultimately our contention was not tested with Mr ABC withdrawing his action shortly prior to trial.

Attributable

The employer must show that the injury was attributable to the misconduct in that the misconduct was one of the causes of injury. The misconduct need not be the sole cause of injury but it must be demonstrated that the injury would not have happened without it.

Case note – *Abdalla v Swan Services (Vic) Pty Ltd (MC(Vic), Magistrate Wright, 24 April 2012, unreported)*

Mr Abdalla was a security guard at a shopping centre and sustained psychiatric injury due to various altercations with a 14 year old boy. The first altercation was physical and occurred when Mr Abdalla attempted to prevent the boy from walking on a wet floor which resulted in him hitting the boy and restraining him against his will. As a result, a second verbal altercation occurred when the boy's mother confronted Mr Abdalla about his behaviour. A third verbal altercation occurred when the boy returned to the shopping centre with his friends that evening and a fourth and final altercation occurred when the boy returned with his friends to the shopping centre a week later and had a physical altercation with Mr Abdalla.

All psychiatrists agreed Mr Abdalla had sustained psychiatric injury from all four incidents and it was argued, on that basis, the injury was attributable to his serious and wilful misconduct due to his actions in, at the least, initiating the first altercation which caused the subsequent altercations to occur.

The Court found the Mr Abdalla's actions in causing the first altercation was in fact serious and wilful misconduct. However, the Court did not consider Mr Abdalla's serious and wilful misconduct in the first altercation meant his conduct in the later altercations was also serious and wilful misconduct. Accordingly, the Court found in Mr Abdalla's favour ruling that where psychiatric injury results from a number of incidents it is not open to find the injury was attributable to the one incident that arose from his serious and wilful misconduct.

Course of employment

Whether an injury arose out of or in the course of employment should always be considered before determining whether the defence of serious and wilful misconduct applies because the defence itself does not.

Rather the defence assumes an injury has arisen out of or in the course of employment which, prima facie, creates an entitlement to compensation and then operates to deny that entitlement if proven that the injury arose from serious and wilful misconduct.

Accordingly, serious and wilful misconduct does not operate to convert conduct which does not occur in the course of or arise out of employment to conduct that is.

For example in *Pollock v Stickfast Labels Pty Ltd (In Liq)* [2002] NSWCA 360 a worker injected heroin at work and over dosed sustaining severe injuries, but the Court ruled that as the activity did not arise out of or in the course of employment there was no need to consider whether the activity amounted to serious and wilful misconduct.

However, misconduct, including criminal conduct can still be found to arise out of or in the course of employment even where such misconduct is plainly in breach of express or implied terms of employment.

In *Albert v Brown* [2008] VCC 588 a long distance truck driver crashed his truck as a result of in part, due to his use of amphetamines. The Court found

the use of amphetamines, whilst illegal, was to combat fatigue and tiredness resulting from his work and accordingly was incidental to his employment as a long distance truck driver.

Section 83 (2) (d) of the ACA and section 46 of the WIRCA may also be relevant to questions on this point stating in certain circumstances, if a worker has acted in contravention of a regulation, or without instructions from the employer, an injury shall be deemed to have arisen out of or in the course of employment if the worker's act was done for the purposes of and in connection with the employer's trade or business.

Case note – Mr X v XXX Pty Ltd

Mr X was a successful businessman who ran a small business as an employee through his family company.

Unbeknownst to his family, for several years Mr X used the premises of the small business to run parties at night for the purposes of his own sexual endeavours and attended the premises at those times deceiving his family under the ruse of performing work activities.

On the night of one of these parties, Mr X was involved in an altercation and ultimately died as a result.

The defence of serious and wilful misconduct was not applicable due to Mr X dying as a result of his injuries. However, that defence was irrelevant because the activities that led to Mr X's death had absolutely nothing to do with his employment by the business and those activities were in fact repugnant to his employment duties.

CARVE OUTS

Severe injury and death

Section 82(5) of the ACA and section 40(6) of the WIRCA state that the serious and wilful misconduct defence will not apply if the injury results in death or "severe injury". If that finding is made, the claim will be assessed as for a normal workplace injury as if the serious and wilful misconduct had not happened at all.

The term "severe injury" replaces the phrase "serious and permanent disablement" in the previous section 82(4) of the ACA.

Unlike serious and permanent disablement which was undefined, severe injury is defined exhaustively in the ACA and the WIRCA as meaning:

- (a) A significant acquired permanent brain injury;
- (b) Permanent paraplegia;
- (c) Permanent quadriplegia;
- (d) Amputation of a limb, hand or foot;
- (e) Full thickness burns that—
 - (i) Cause permanent severe disfigurement to the head or neck or an arm or a lower leg; or
 - (ii) Result in a significant permanent inability to undertake the necessary activities of daily living;

- (f) An injury that results in permanent blindness;
- (g) A brachial plexus injury that results in the permanent effective loss of the use of a limb;
- (h) A physical internal injury that results in a significant permanent inability to undertake the necessary activities of daily living.

Whether an injury meets the definition of “severe injury” will be a question of fact largely based on medical evidence and may be difficult to determine if the worker’s injuries have not stabilised.

Although there is no case law on point, if a finding of serious and wilful misconduct is made, it would appear the burden of demonstrating the injury is a “severe injury” rests with the worker.

Driving offences

Section 82(4) of the ACA and section 40(5) of the WIRCA are subject to, respectively, sections 82A, 82B and 82C of the ACA and section 42, 43 and 44 of the WIRCA. Those sections carve out separate penalties for injuries arising from drink driving, drug driving and convictions for serious road traffic offences.

As with serious and wilful misconduct, those sections do not apply in the event the injury results in death or severe injury, or, if the worker can satisfy the VWA or the Self Insurer (as the case may be) that the concentration of, or presence of drugs or alcohol, in a worker’s system did not contribute in any way to the injury.

Moreover, if a conviction for a relevant road traffic offence is overturned on appeal both the ACA and the WIRCA state the worker is entitled to any compensation payments he or she may have been entitled to in the absence of that initial conviction, plus interest!

Of course the worker’s conduct must still be in the course of employment in order for those sections to apply.

In *Scharrer v Redrock Co Pty Ltd* [2010] NSWCA 365 the worker suffered serious injury when she crashed her motor vehicle driving home following a night at her employer’s Christmas party where she had consumed a large amount of alcohol to the extent that after the crash she returned a blood alcohol reading of 0.124. It was not in dispute the worker was in the course of her employment when at the Christmas party, the issue was whether her travel following that was.

The Court of Appeal denied the claim because it found, amongst other matters, the employer had not expressly encouraged or induced the worker to drive home from the Christmas party in her company vehicle, had prohibited her from doing so and the worker’s act of driving was not done for a purpose in connection with the employer’s trade or business. The Court of Appeal stated in those circumstances the defence of serious and wilful misconduct or the related provisions were not relevant.

APPLICATION OF SERIOUS AND WILFUL MISCONDUCT ARISING OUT OF AN ASSAULT

The defence of serious and wilful misconduct more often than not revolves around physical altercations.

The Victorian Court of Appeal handed down a decision in the case of *Martin v Bailey* [2009] VSCA 263 that looked at the circumstances in which an

assault may take an employee outside the course of their employment and in doing summarised the applicable law from many of the related cases that have occurred before it. The Court of Appeal came up with the following general propositions:

- (a) If the altercation had its origin in an employment related matter, the injury is likely to be regarded as having arisen 'out of the employment';
- (b) If the altercation had its origin in a private quarrel or a personal grievance, then the injury is unlikely to be compensable unless the worker was carrying out the duties of his/her employment when injured and was not the aggressor.

Since that decision, in addition to Abdalla (see above), several unsuccessful attempts in our jurisdiction have been made to apply serious and wilful misconduct to assault cases being *Styles v Red Rooster Foods Pty Ltd* (MC(Vic) Magistrate Wright, 18 April 2011, unreported), *Cole v NMHS* (MC(Vic) Magistrate Wright, 23 March 2011, unreported) and *Berryman v Saferoads Pty Ltd* (MC(Vic), Magistrate Garnett, 13 March 2012, unreported). Nevertheless those decisions do provide some learnings.

In *Styles* an acting manager at a fast food restaurant had a violent physical altercation with a customer resulting in a broken hand.

The Court found *Styles'* conduct, although excessive, was not serious and wilful misconduct on the basis, amongst others, he was not the aggressor, some physical intervention by staff at the restaurant may be warranted in some circumstances and that when looked at subjectively he had attempted to avoid the confrontation.

In *Cole*, the serious and wilful misconduct defence also failed. *Cole* was a geriatric care nurse who had an altercation with an elderly resident with dementia when she found him going through her handbag at the nurse's station. *Cole* subsequently pushed the elderly resident back to his room and then placed him on the floor where she proceeded to change his clothes in contravention of the employer's policy. Other nurses came to the room to diffuse the situation and upon attempting to have *Cole* and the elderly resident shake hands and apologise, the elderly resident feigned the hand shake and punched *Cole* to the chin knocking her out.

The Court found although *Cole's* actions were in contravention of the employer's policy and unnecessary, her actions arose in the management of the resident for the purpose of her employment and therefore did not amount to assault.

In *Berryman*, a worker was injured from an altercation with a co-worker following the employer's Christmas function, a day out at Sandown Racetrack. The employer had sanctioned the function and provided its employees with beer and wine. After imbibing significant quantities of alcohol employees took a bus back to the employer's premises and during the journey *Berryman* verbally and physically abused another employee. When the bus stopped the employee confronted *Berryman* and a fight ensued.

The Court found that:

- Despite *Berryman's* actions the fight did arise out of the course of employment because the dispute between *Berryman* and the employee that gave rise to the fight had its origins in the workplace.

- As the employer had encouraged Berryman to attend the Christmas function and his behaviour whilst inappropriate, did not amount to “gross misconduct” so as to take the resulting injuries outside the course of employment.
- Although Berryman’s conduct was totally unacceptable and inappropriate it fell short of being serious and wilful misconduct, in part it appears, because he had not instigated the fight when the bus stopped.

Despite those examples demonstrating unsuccessful verdicts for employers, there are nevertheless numerous examples where the serious and wilful misconduct defence has been applied effectively to assault cases leading to the worker withdrawing the claim prior to or during trial.

SOME SUGGESTIONS FOR SETTING THE GROUND WORK FOR A SERIOUS AND WILFUL MISCONDUCT DEFENCE IN PRACTICE

- If possible, obtain contemporaneous statements and/or reports from the injured worker and any employees involved in the incident to establish why the incident occurred and what the worker’s intention was (i.e. wilfulness). Check to see whether any CCTV footage or other digital evidence of the incident exists as this can be critical to establishing what occurred.
- Protect the welfare of other employees involved in the incident, in assault cases (or if otherwise warranted) it may be appropriate to stand the injured worker or other protagonists down whilst an investigation into the incident occurs.
- If the incident warrants it, consideration should be given to referring the matter to the police.
- If you are considering instituting disciplinary action remember any injuries arising from that may be compensable unless it is undertaken on a reasonable basis and in a reasonable manner. In many cases whilst the serious and wilful misconduct defence might succeed, ultimately the case falls down on other grounds.
- If rejecting a claim on serious and wilful misconduct grounds, the course of employment ground should also be relied upon.
- Although it is impossible to prevent all serious and wilful misconduct at this time of year, ensure instructions are given to employees prior to employer functions about what is and isn’t acceptable behaviour.

WRITTEN BY

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